Supreme Court, U. S.
FILED
MAY 22 1979
MICHAEL RODAK, JR., CLERK

No. 78-1502

In the Supreme Court of the United States

OCTOBER TERM, 1978

VITTORIO SOLVINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erroneously denied his demands for discovery and an evidentiary hearing which he sought in order to establish his claim that he had been singled out for prosecution because of his Italian ancestry.

1. Following a bench trial on stipulated facts in the United States District Court for the District of New Jersey, petitioner was convicted of re-entry into the United States after having been deported, in violation of 8 U.S.C. 1326. He was sentenced to two years' imprisonment; the sentence was suspended, and he was

placed on unsupervised probation for five years.[1] The court of appeals affirmed by judgment order (Pet. App. 1a).

2. Before trial, petitioner moved for a "hearing on the issue of the Government's alleged discriminatory prosecution" and sought extensive discovery of statistical information allegedly relevant to that defense.[2] Petitioner alleged that his attorney had told him that most illegal aliens were never prosecuted and that he was being singled out because of his Italian ancestry[3] (Br. 4).

As this Court held in *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962): "[T]he conscious exercise of some selectivity in [law] enforcement is not in itself a federal constitutional violation." In order to demonstrate illegal discrimination,

> a defendant bears the heavy burden of establishing, at least *prima facie*, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

United States v. *Berrios*, 501 F. 2d 1207, 1211 (2d Cir. 1974). The decision whether to hold a hearing on a claim of selective prosecution "lies largely in the trial judge's discretion." *Id.* at 1212.

That discretion was not abused here. The trial judge found that "the contention here that the [petitioner's] ancestry is the basis for his prosecution is totally conclusory and based on conclusions which cannot be drawn from the evidence presented by the [petitioner] to me." (Deft. Ct. App. Brief, App. B 7). Furthermore, the trial judge found, and petitioner's counsel agreed, that the government "apparently believe[s] that [petitioner] is a gangster and they have in fact singled [petitioner] out for prosecution for this crime at least in part because he is a gangster," and that such a course of action "is not impermissible." *Id.* at B10 to B11.

Thus, petitioner's allegations fail to satisfy the "burden of proving a colorable entitlement to the defense of discrimination so as to entitle [petitioner] to the desired * * * documentary evidence." *United States* v. *Berrigan*, 482 F. 2d 171, 181 (3d Cir. 1973). Accord, *United States* v. *Cammisano*, 546 F. 2d 238, 241 (8th Cir. 1976); *United States* v. *Berrios, supra; United States* v. *Murdock*, 548 F. 2d 599, 600 (5th Cir. 1977).

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[1]It was a condition of his probation that petitioner not again illegally enter this country and that he obey the lawful orders of the Immigration and Naturalization Service (Sent. Tr. 6).

[2]Petitioner sought, *inter alia*, statistics concerning (1) the number of illegal aliens in the United States; (2) the number of persons deported nationwide during the last five years; (3) the number of persons deported from New Jersey during the last five years; (4) the number of persons in New Jersey who re-entered the country illegally after deportation; (5) the number (and captions) of all prosecutions under 8 U.S.C. 1326; and (6) the names and backgrounds of all persons prosecuted under 8 U.S.C. 1326, as well as all intra-governmental correspondence concerning his case.

[3]Petitioner submitted an affidavit from his attorney and a magazine article in support of his contentions.

Petitioner's situation is not similar to that of most other illegal aliens, because Section 1326 applies only to those who, like petitioner, have been previously deported. As the district court concluded (Deft. Ct. App. Br., App B12 to B13), the government was amply justified in initiating this prosecution, because petitioner had twice previously escaped prosecution for illegal entry and had merely been deported on both occasions. Accordingly, petitioner has failed to show that the district court abused its discretion in denying his request for discovery and a hearing.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MAY 1979

DOJ-1979-05